



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 16, 2003

Mr. Swanson W. Angle
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2003-6488

Dear Mr. Angle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187725.

Dallas Area Rapid Transit ("DART") received a request for a copy of "the General Engineering Consultant's (LAN/STV) response with regard to the request for equitable adjustment" submitted by the requestor. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

We note that the information in Attachment B is expressly public under section 552.022 of the Government Code. Section 552.022(a)(1) of the Government Code provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is excepted from required public disclosure unless made confidential by other law. The entire report must therefore be released under section 552.022 unless the information is expressly made confidential under other law or is excepted from disclosure by section 552.108 of the Government Code. You do not raise section 552.108. Section 552.103, which excepts information relating to litigation, and section 552.111, which excepts

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information within the attorney work-product privilege, are discretionary exceptions under the Public Information Act and do not constitute “other law” for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body’s position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Thus, DART may not withhold the submitted information under section 552.103 or 552.111 of the Government Code.

However, the attorney work-product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

In this instance, you state that litigation is imminent because of the significant amount of damages involved. You state that DART's administrative dispute process is initiated when, as here, the contractor submits its Request for Equitable Adjustment. You further state that the contractor has the right to appeal the decision within ninety days by filing an appeal before an administrative law judge and that the contractor has expressed its intent to appeal in this instance. You state Attachment B was created by DART's consultant solely for the purpose of anticipated litigation. Based on your representations, we conclude that Attachment B was created in anticipation of litigation. Further upon review of your arguments and the submitted documents, we conclude that Attachment B represents the mental impressions, opinions, conclusions, or legal theories of an attorney's representative as contemplated by Rule 192.5 of the Texas Rules of Civil Procedure. Therefore, you may withhold Attachment B under Rule 192.5 of the Texas Rules of Civil Procedure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

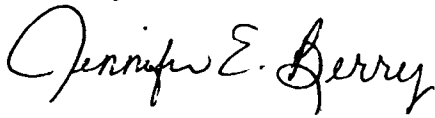
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer E. Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 187725

Enc: Submitted documents

c: Ms. Dorris William
Project Manager
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(w/o enclosures)